

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**RECEIVED**

JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION  
DEPT. OF THE INTERIOR

In the Matter of

1998 Biennial Regulatory Review --  
Streamlining of Mass Media Applications,  
Rules, and Processes

Policies and Rules Regarding  
Minority and Female Ownership of  
Mass Media Facilities

MM Docket No. 98-43

MM Docket 94-149

**PETITION FOR RECONSIDERATION**

Cornerstone Community Radio, Inc. ("CCR"), permittee of noncommercial educational FM broadcast station WGNJ, St. Joseph, Illinois, through counsel and pursuant to Section 405 of the Communications Act and Section 1.429(a) of the Rules, hereby petitions for reconsideration of the FCC's *Report and Order* in the above-captioned proceeding, FCC 98-281, released November 25, 1998 (published in summary form, 63 *Fed. Reg.* 70040, December 18, 1998) (the "*R&O*"), insofar as the FCC, in the *R&O*, adopted a rule limiting the period for construction of new broadcast stations to three years, with no provision for extension of construction permits where construction is delayed by reasons beyond the permittee's control, except for "acts of God" and during periods where issuance of the construction permit is the subject of FCC or judicial review. *R&O*, ¶¶ 77-90.

With one hand, the FCC, in the *R&O*, has extended the period for construction from two to three years but, with the other hand, the FCC has taken away much if not all of the benefit by precluding extension of construction permits, with only a handful of exceptions, where delays in construction are caused by reasons beyond the applicant's control. While this action is justified as

No. of Copies rec'd at 11  
List ABCDE

necessary to expedite new service to the public and prevent warehousing of spectrum, *R&O*, ¶ 90, the FCC provides no supporting evidence and makes no finding that either of these objectives requires a change in the rules. There is every reason to believe that, as a group, the FCC's broadcast station permittees construct new stations as expeditiously as possible and no reason to believe that, in any significant numbers, permittees are delaying the completion of construction for improper purposes.

The result of the new rule will be the forfeiture of numerous construction permits in circumstances where the permittee has taken every possible, reasonable step to resolve delays and proceed with construction. The self-evident unfairness of this result will be compounded by the application of the new rule to permits that have already been issued under the old rules, where permittees have already expended substantial resources in the pursuit of bringing new service to the public only to be frustrated by reasons beyond their control -- and in some cases within the FCC's control.

In fact, the FCC's formulation of the supposed problem demonstrates the illegitimacy of the solution. As the *R&O* states, ¶ 79, "it remains the case that a significant number of permittees do not succeed in constructing their proposed facilities prior to permit expiration. As a result, we continue to receive large numbers of extensions each year." The *R&O* does not acknowledge that the overwhelming majority of these applications are granted because (1) construction is complete and testing is underway; (2) substantial progress toward completion of construction has been made, or (3) no progress has been made due to reasons beyond the permittee's control (including delays caused by governmental budgetary processes and zoning problems). The FCC's record of granting these applications shows that neither unwarranted delay in inaugurating new service nor "spectrum warehousing" is a significant problem.

The real motivation behind the FCC adoption of a rule that sharply limits its own discretion to grant an exception is revealed by the further statement in ¶ 79 of the *R&O* that: “Substantial staff resources are required for fact-intensive analysis involved in processing and disposing of these applications. Our goal in this proceeding is to *substantially reduce paperwork and administrative burdens on permittees and the number of requests for additional time to construct* while promoting the expeditious construction of stations.” (Emphasis added.) This purpose serves only the FCC’s administrative interest and has very little, if anything, to do with the public interest. Other rules could have been adopted that would have served the FCC’s objective just as well. For example, if the FCC simply extended the construction period, the number of extension applications -- and the burden on the FCC -- would be expected to decline and, when an extension was sought, the burden of showing that the failure to complete construction was due to reasons beyond the permittee’s control would be more difficult to meet (thereby diminishing the possibility of manipulating the extension process to “warehouse spectrum”). Instead, the *R&O* adopts an arbitrary, fixed period for completion of construction, and in its own administrative interests -- and at the expense of the public interest -- precludes the agency from considering legitimate, even compelling, showings that the permittee has been unable to complete construction for reasons beyond its control.

The WGNJ construction permit, issued May 9, 1994, is a case in point. At the time the initial construction permit application was filed, CCR had secured permission to mount an antenna on an existing television station tower. Shortly after the construction permit was granted, the television station was sold and the new owner insisted on making additional tower strength studies before confirming the availability of space for the antenna on the tower. The timing and completion of these studies, the failure of the tower to pass a stress test, and the communication of those test results to

CCR shortly before the scheduled expiration of the construction permit, was not within CCR's control. When CCR identified another existing tower, the extended corporate decision-making process of the tower owner was not within its control. When authorization of the next identified transmitter location required a "major change" application, under Section 73.3573(a) of the FCC's rules, that was not a matter within CCR's control. And when a competing application was filed, and the competing applicant filed informal objections against a CCR amendment that sought to resolve the mutual exclusivity between the two applications, those matters also were not within CCR's control.<sup>1</sup>

As with WGNJ, the most common source of delay in the construction of new NCE-FM stations is the loss of a painstakingly-selected transmitter site. While careful consideration is also required in choosing a transmitter site for a commercial station, NCE-FM applicants are invariably constrained in choosing a site by a variety of factors. These include the FCC's rules prohibiting overlap of interfering contours with the service contours of other NCE-FM stations and television Channel 6 stations. The congestion in the reserved portion of the FM band often dictates location of a new NCE-FM station within a very small window, which may encompass only a very few suitable transmitter sites. Because the vast majority of NCE-FM applicants have very limited resources -- a fact the FCC has recognized in a number of different contexts, the "suitability" of a transmitter site for a new FM station reflects a number of specific factors, which are not merely desirable but in many cases essential. Because of the cost of tower construction, the ability to mount an antenna on an

---

<sup>1</sup> These events have been documented in various extension applications, the most recent of which (File No. BMPED-980918JA) was granted on October 20, 1998. The Informal Objection of Word Power, Inc. to CCR's amendment of its pending modification application, which was filed June 16, 1998, has not yet been resolved by the FCC.

existing tower is often the foremost consideration. Where that is not possible, the selection of another site is heavily influenced by other cost factors, such as the availability of electrical power, whether the site will require construction of an access road or other extensive site preparation, and whether an extended, resource-consuming process will be required to secure local land-use approvals.

When a suitable site is lost, therefore, the consequences for NCE-FM permittees are difficult to overcome and -- because of the limited resources available to most noncommercial broadcasters -- are likely to engender considerable delay in construction while the permittee seeks and secures a suitable alternative site and obtains FCC approval for the site. (Not infrequently, the choice of an alternative site results in a change of 50 percent or more of the area within the authorized service contour. The rules make this a "major change" -- a circumstance unique to NCE-FM stations -- and prolong the FCC approval process, and make the outcome more problematic -- by subjecting such modification applications to a further cut-off period and the possibility of competing applications.)

Because NCE-FM applicants for new stations typically have limited financial resources, they usually are not in a position to take steps, prior to FCC approval, to "insure" against the loss of a proposed transmitter site. That is, they are not able to enter into binding leases and pay security deposits, or purchase land, or commence local zoning proceedings, until the FCC has granted their applications -- an event which not occur until months or years after the application is filed. Neither can NCE-FM permittees reasonably be expected, when an authorized transmitter site becomes available, to take other measures -- such as the construction of, in effect, "temporary facilities" at an inferior location -- while planning and hoping to provide their communities with optimal service from a better site at some time in the future. Accordingly, the loss of an authorized transmitter site due to reasons beyond an NCE permittee's control clearly justifies extension of the construction permit,

if the permittee has taken all necessary, reasonable steps to secure an alternative site, modify its authorization, and proceed with construction.

The FCC's existing rules -- Sections 73.3534 and 73.3535 -- are sufficient to spur the expeditious completion of construction and prevent warehousing of spectrum in the reserved portion of the FM band. The *R&O* offers no evidence that there is any serious problem of unjustified delays in construction or of permits held without any intent to complete construction. (CCR has built every FM station for which it received an initial construction permit, including at various times WGNV(FM), Milladore, Wisconsin; WJLU(FM), New Smyrna Beach, Florida; WGNN(FM), Fisher, Illinois; WJLH(FM), Flagler Beach, Florida; WWGN(FM), Ottawa, Illinois, and WLGM(FM), Springfield, Illinois.)

If the FCC wishes to reduce the number of extension applications, it can do so, legitimately, by increasing the period for construction from two years to three. It cannot do so, consistent with the public interest, by adopting rules which preclude the agency from extending construction permits where the delay in completing construction is due to reasons beyond the permittee's control.

For the foregoing reasons, this Petition for Reconsideration should be granted.

Respectfully submitted,

CORNERSTONE COMMUNITY RADIO,  
INC.

By 

J. Geoffrey Bentley

J. Geoffrey Bentley, P.C.

BENTLEY LAW OFFICE

P.O. Box 807

Herndon, Virginia 20172-0807

(703)793-5207

Its Attorney

January 19, 1999